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## THE CODE NAPOLÉON.

*"Le pouvoir législatif est la tout-puissance humaine. La loi établit, conserve, change, modifie, perfectionne: elle détruit ce qui est; elle crée ce qui n'est pas encore."*

Portalis.—"*Exposé du projet du Code.*"—An XI.

Offspring of necessity and opportunity, conceived at the moment of a political and social debacle, quickened amid horror and fury, and born in the exaggerated light of a new imperialism, this truly remarkable body of laws, known generally as the *Code Napoléon*, marked the beginning of a new era in practical jurisprudence.

The work was framed to embrace the civil relations of citizens of a public and private nature. It was promulgated under Bonaparte as First Consul, March 21, 1804, as *Le Code civil des Français*. The imperial government having taken the place of the republic, the Legislative Corps on August 24, 1807, adopted a new edition of the same work under the title of *Code Napoléon*. This was pursuant to the wishes of the Emperor, whose limitless ambition craved permanent identification with this legal creation, which he regarded as one of the greatest glories of all his supremacy.

The restoration, while retaining the laws, officially

restored the original title, but popularly the name of the great conqueror has ever remained attached to the civil code of France.

Closely following the adoption of this initial work other codifications took permanent form, and under the empire the whole series was adopted under the title of *Les Cinq Codes*, consisting of the civil code, called, as before mentioned, *Le Code Napoléon*, *Le Code de procédure civile*, *Le Code de Commerce*, *Le Code d'instruction criminelle* and *Le Code pénal*. Subsequently *Le Code forestier*, *Le Code rural* and *Le Code de justice militaire* were added. Many additions and amendments by legislative enactment have been made during the tumultuous history of France, but despite startling political vicissitudes, her codified laws as a whole have substantially maintained their original base and structure. The civil code has received the special honor of adoption in substance in half of the civilized countries of the world.

The vital circumstances making this new legal genesis necessary were both political and social in their nature. Without any intention to instruct, but with a view solely of leading to a just appreciation of the exact status of the French people, when the *Etats-Généraux* convened at Versailles on May 5, 1789, some historical consideration will be given to the civil conditions which caused the radical acts of that assembly and those begotten by it. This point is selected because then began the formative processes which produced the *Code Napoléon* fifteen years later.

An important part of that brief historical review will necessarily include political affairs as dominating all other matters pertaining to this subject.

The conflicts between sovereign and vassals for enlarged prerogatives and centralization of power in the former and increased provincial independence to the latter, the political recognition of the clergy, the "Lettres de Commune" of the Kings giving freedom to the cities, manumissions and enfranchisements by the seigneurs to serfs and villages culminated at the commencement of the thirteenth century in a monarchy of considerable cohesion under Philip le Bel. He conceived the idea of maintaining his royal powers by recog-

nizing the *bourgeoisie* as a third order for a balance of power between the *noblesse* and the *clergé* who were not always in accord with the King. By assembling in 1302 the first *Etats-Généraux* to which the *Tiers Etat* was summoned, he not only accomplished his immediate purposes, but unwittingly builded a door that opened more than four centuries later for the exit of that same monarchy, become hideous in its gaudy decrepitude.

This assembly met frequently during that same century, but the country lost interest on perceiving that owing to the three orders voting separately as units the sovereign could succeed in having adopted any measure he desired. The crown also introduced a theory of almost unlimited implication as to powers actually granted. This so increased the submission and indifference of the nation that after the assembly of 1439 the implied authority sufficed until the meeting of 1614, when the *Tiers Etat* was so inconsiderately ignored and affronted. The next meeting of the *Etats-Généraux* was on the eve of the Revolution and the *Tiers Etat* took its revenge. "Tant va la cruche a l'eau qu'a la fin elle se casse."

The nation when thus assembled exercised powers of a purely governmental character. It considered questions only of revenue, arms and provincial and realm politics, never of private law. Each of the three orders, however, had the right to present a list of grievances for rectification at the royal hand, but these grievances were corrected through an entirely different branch of the governmental system.

This branch in theory was the representative of the royal fountain of justice, and consisted of tribunals for the assertion of rights and the redress of wrongs which a man trained in the common law would call courts.

In early feudal times a body of nobles acting vaguely as a sort of advisory council to the King followed his person and settled questions involving private rights as they deemed equitable and just or as suggested by the crown. Pepin (752-758) reposed in this body the special judicial functions of the realm, still requiring it however to follow the court. He called the body a *Parlement*, and by that name the royal courts of France continued to be designated until

the Revolution. The earliest of importance in French history was that known as the *Parlement de Paris*, having jurisdiction over about half the country. This was founded by Louis VII. (1137-1180), but continued to follow the King until Philip le Bel fixed it at Paris in 1302, in the same year, as will be observed, that he first summoned the *Tiers Etat* to meet in the *Etats-Généraux*. In addition to its judicial functions the *Parlement de Paris* afterwards received as a special attribute, which it retained until the end, the right of registering the edicts, ordinances, declarations and letters-patent of the Kings of France. This formality was declared to be necessary to give the royal acts authority of law, and also served as a political measure in turning all eyes toward Paris, consolidating the divers dialects into a common language and promoting the much-sought centralization of power in the hands of the ruler. It was in theory also a submission of each law to the scrutiny and consent of the judiciary, for a vote was necessary to authorize the registration. This, however, proved an illusory power, for when the *parlement* refused to register a decree, as sometimes happened, the King appeared in person, held a *lit de justice*, and, all delegated powers being thus suspended by his presence, ordered the registration to be entered as an act of the judicial body.

The *Parlement de Paris* was divided into three chambers, the *Grand Chambre*, for cases of great solemnity, and two *Chambres de Requêtes*, for ordinary affairs.

Other *parlements* were instituted as follows: Toulouse, in 1302; Grenoble, 1451; Bordeaux, 1462; Burgundy, 1497; Rouen, 1499; Aix, 1503; Rennes, 1553; Pau, 1620; Metz, 1633; Besançon, 1676; and Douai, 1713, each having exclusive territorial jurisdiction, and to a great extent administering laws conflicting with those of others. The chief officers were a president and several *présidents à mortier*, so named because of a cap of peculiar form worn by them, and still used by the presidents of French courts.

It may not be out of place to mention here a feature of the composition of these courts which was frequently referred to in the latter period of national reconstruction.

Until the time of Francis I. (1515-1547) the members were selected from the most scholarly of the *noblesse* and *clergé*, who accounted the appointment a high honor, but under that monarch the sale of seats began, and they continued to be objects of purchase until the end.

It should be stated that the *parlements* named were established in only purely crown provinces. This recalls the fact that all the justice or injustice of France was not administered in the King's courts. The nobles jealously guarded the privilege of administering justice, both civil and criminal, within their own domains. In the days when the lines between the *servi*, the *villani*, the *freemen* and the *liege-lord* were clearly drawn, the rights of property little extended or diversified, trials by wager of battle still common and crimes punished by fine, the baron could well represent the blind goddess without great inconvenience. He, moreover, had absolute power to cause his decisions to be respected and his judgments executed. When, however, the feudal ties became modified, and the learning and influence of the clergy lent more certainty and reliability to the royal tribunals, the baronial courts fell into désuétude, and toward the end mostly disappeared, but, unfortunately, leaving the serfs without remedy for wrongs, and imbedding in many baronies traditions recalled in after years by terrible reminders.

These *parlements* and provincial courts administered laws which, aside from presenting a most interesting study, are of importance, because embodying a large part of the abuses against which the nation protested in 1789, and in the correction of which the *Code Napoléon* was a natural result. There were also some admirable features which were strongly reflected in that work.

Notwithstanding the centuries of general superstition, ignorance and gloom following the recession of Rome from French soil the effects of the four hundred years of Latin domination were not only not obliterated, but in laws and language left an enduring impression. When the Roman power in Gaul succumbed to inherent defects and exterior assault, law as a science had reached a point of perfection that assured the people justice and tranquillity. It is true

that the monumental work of Tribonian had not yet provided the only lustre for the name of Justinian, but the principles of the Twelve Tables had already been amended, supplemented and much refined by the *lex*, the *plebiscitum*, the *senatus-consultum* and the *constitutiones-principes*. The *Flavian law* also had provided for regular forms of action; the *Prætorian edicts* had introduced substantial equity, and finally the juriconsults had moulded the whole into a scientific system of jurisprudence made more definite in form, perhaps, but unimproved in substance by later codification. At the end of the Roman occupation the Civil Law as then administered and studied in the Prætorian Code, Institutes of Gaius, the writings of Ulpian, Paul and Papinian and the Theodosian Code shrank before the iconoclastic invaders and retired for centuries to the scattered monasteries where the written Latin tongue preserved its purity. It was succeeded by crude feudal customs unworthy of the name of law that were perhaps more equitable in some rare respects, but certainly more confusing generally.

Without dealing particularly with the inauguration and development of this species of justice administered without settled laws or defined methods, when private war, individual vengeance, wager of battle, compurgation, judicial combat and the appeal to Heaven were for several centuries features of determining disputes, it may be said that the influence in overcoming these barbarisms and opening the way for a more enlightened administration of justice was undoubtedly that of the clergy.

These men of the Church having been accepted as superior by reason of their holy offices and the support of the successive Bishops of Rome, early claimed exemption from civil jurisdiction as to their own status, functions and property.

During the period they were securing recognition as an Order of the State they also adopted every pretext to enlarge the jurisdiction of the spiritual courts, and a time arrived when almost every litigation became cognizable therein. To induce compliance to this usurpation, and then to retain its force, it became necessary to adopt laws and methods of administering justice more definite, regular and equitable than the royal and baronial courts provided. How well they

succeeded is evidenced by the strength of the Canon Law the influence of which, though diminished by the fierce fires of the Revolution, survived and left its impress upon the very pages of the *Code Napoléon* itself.

In spite of the progressive and utilitarian character of the Canon Law, its manifest foundation being the Roman law, of which the clergy alone had retained a record and a knowledge, it served admirably the main purpose underlying its development—to establish the spiritual and temporal dominion of the popes through the elevation of churchmen to political positions and the subjugation, control and attachment of the people in all social grades.

While this purpose was best served at first by establishing spiritual courts, the political advancement of the clergy enabled them to engraft their laws upon the methods of civil administration of justice, and in time the jurisdiction of the spiritual courts became absorbed by the royal *parlements*, which in turn by the same gradual process came to administer the Canon Law. The discovery of the *Pandects* in the twelfth century, and the rise of the *Glossators*, causing the well-known revival of the study of the Civil Law, which Blackstone says well-nigh completed the ruin of the Common Law of England, while arousing the jealousy of the Gallican Church, ultimately had great effect upon the laws of France. Despite the *decretal* prohibiting the study of the Civil Law in the University of Paris, and ordering that the Canon Law alone should be taught, Philip le Bel did establish the study of the former at the University of Orleans, although it was not permitted at Paris until 1679.

This struggle, while it produced great writers during and subsequent to the sixteenth century, and led to a recognition of the Civil Law basis of the Canon Law, and to the adoption of many principles of the former, on the whole had no substantial results so far as settling the laws of France into any consistent or perceptible regularity.

It is not difficult now to discern the evils which made this so nor to declare why they remained without order until the disturbing causes had disappeared. The innumerable general and local *coutumes* of the feudal system affecting both lands and the people which had served or had not interfered with



the political exigencies of the monarchs, nobility or clergy had been allowed to remain undisturbed or were emphasized by royal decree. The rest was a vast collection of *ordonnances* of the sovereigns, creating, destroying, modifying or regulating all things in the light of the particular age, reflecting the influences of *noblesse*, *clergé*, *bourgeoisie*, and oftentimes particular individuals, and consequently partaking in large parts of the Canon Law, the Civil Law, and even temporary measures.

D'Aguesseau divides the *ordonnances* into two classes :

“Les unes n'ont pour objet que la procédure ou les règles de l'ordre judiciaire. Les autres ont rapport au fonds même de la Jurisprudence Civile, Canonique ou Française.”

The power to ordain being practically absolute, the ends desired largely political, the source arrogant and corrupt, the laws were arbitrary. Obscurity and inconsistency resulted and gave opportunity for, and made necessary, interpretation, discussion and criticism.

The bar of France which this state of the law created, while mostly unclassed churchmen and studious nobles in early times, mainly in consequence of the revival of the Civil Law, grew into a body of philosophers whose learning and writings have always been the pride of France. To mention such names as Cujas, Coquille, Dumoulin and Pithou, of the sixteenth century; Godefroy, Duplessis, Domat, Fleury, Lemaistre and Patru, of the seventeenth century, and Cochin, Gerbier, Montesquieu, D'Aguesseau and Dupaty, of the eighteenth century, is not, however, to assert that their profound wisdom and ability marked the bar of France at the close of the old *régime*. Such, indeed, was not the case. The beginning of the eighteenth century marked a decline in the mental endowments and the social status of its members, which bore sore fruit in the after troublesome times. What roads of learning the former jurists had traveled in preparing for their honorable vocation as semi-official *corps-pendants* of the various *parlements* is clearly set forth in the letter of D'Aguesseau to his son, who was preparing for the bar at Paris (1715). He recommends a systematic study of Roman Law, Ecclesiastic Law, French Law and Public Law. As authors to be read

he cites the following: (on Roman Law) *Legum delectus* by Domat, *Commentaires sur les lois de Papinien* by Cujas, *Commentaires sur le Code Théodosien* by Godefroy; (on Ecclesiastic Law) *Institutions* of Fleury, *Specimen Juris Canonici* by Doujat, *Libertés de l'Eglise Gallicane* by Pithou, *Histoire de la Pragmatique Sanction et du Concordat* by du Puy; (on French Law, which he divides into *Coutumes* and *Ordonnances*) *Institutions du Droit François* by d'Argou, *Histoire du Droit François* by Fleury, *Les Régles* by Loisel, *Le Commentaire* by Duplessis, *Commentaires sur les Fiefs de la Coutume de Paris* by Dumoulin, and the *Code Henri*, a collection of *ordonnances* made by Brisson in 1585. This outline of practical study in preparing for the bar was not broader than the schools of law permitted and encouraged to be pursued. Although the study of the law in France was long confined to the schools of theology, as in Rome it was long concentrated in the college of the pontiffs, as a science it was taught as early as the twelfth century. In spite of the restrictions of the clergy, arising from the struggle for supremacy between the Canon Law and the Civil Law, schools of law had been instituted so generally throughout the realm that France could well have boasted of their conduct and their results.

However, the schools of law and the bar not only did not escape the national blight following the reign of Louis XIV., but in the ensuing years so lost their learning, dignity and social standing that the schools became mockeries and the lawyers applause-seeking declaimers of the principles of Voltaire and Rousseau. Indeed, Pasquier says in his "Memoirs" that one of the first books put into his hands as a student was *Le Contrat Social*.

The following translated excerpt from the "Exposé des Motifs" of Fourcroy, Councillor of State, when he presented his bill for the creation of new schools of law, on sixteenth Ventose, year XII (March 7, 1804), gives some light upon the situation.

"Previous to 1793 France possessed a great number of schools of law, but the great want and neglect of discipline had caused them to become useless institutions, not to say illusory or dangerous. . . . The studies therein were

null, inexact or rare, the lectures neglected or not followed; exercises were bought instead of being prepared by the students, who passed after a test so easy that it no longer merited the name of an examination."

If to these grave defects in the very body of the laws and the retrogression of the men called upon to assist in their interpretation we add the political sins of the government, the oppressions of the nobles, the arrogant and unholy exactions of the clergy, and the rise of the Cyclopedists, with their contempt for religion and morals and Utopian theories of liberty, we shall have then marshaled the great causes of the oath of the tennis-court and all the ensuing dire calamities that France suffered in purification and preparation for that great epoch which produced the *Code Napoléon*.

One is obliged to divide that epoch into two distinct periods, the one of destruction and the other of reconstruction, each progressively excessive.

It was during the former that necessity combined with opportunity to make the civil code at first possible, and then inevitable.

If one pause to consider the sequence of the States-General, the self-constituted National Assembly, the resultant Constituent Assembly, the experimental Legislative Assembly and the consequent National Convention, the conviction cannot be resisted that the new men, mostly the same in those successive bodies, meant to absolutely blot out the past. The situation was fully expressed by Barrère, in *L'Aurore*, which he published while acting as deputy to the States-General: "You are called upon to recommence history."

The destruction of the ancient edifice began with almost calm deliberation. The first measures being directed to relief from the sorest oppressions, equalization of taxation and moderation of the feudal servitudes were accomplished with comparatively dispassionate consideration. Then the realization of power, magnified by the timidity of the court, the mercenary adherence of many nobles, and the crafty support of the bulk of the clergy, accelerated the course of events until the mighty current swept everything

before it. The abortive constitution of 1791 gave a momentary hope of a peaceful revolution by laying low monarchy and all that remained of the feudal system, suppressing privileges, establishing the civil and political unity of the sovereign nation, enfranchising labor by proclaiming the freedom of commerce and industry, confirming the individual rights of property, rectifying and humanizing justice, recognizing liberty of thought and conscience, of speech and of the press, and preparing the way for the unity of the civil laws. This worthy work unfortunately was produced during an ominous calm while the nation swayed between ancient traditions and new sensations. Within the year of its adoption this constitution had been set aside through abuse of the powers, far too wide, vested in the Legislative Corps, and the redoubled political intoxication swiftly led on to the National Convention, which completed the national abasement.

This period presented the great opportunity for producing a civil code. The royal *parlements* had been abolished and replaced by crude territorial or district tribunals, which were even denied the official title of courts, presided over by men unlearned in the law. The bar of France had been suppressed. The religious offices of the clergy had been prohibited and their property confiscated. Titles of nobility had been abrogated and their appurtenant territories seized by the nation. Ancient baronial boundaries had been obliterated, all men proclaimed citizens with equal rights, and finally royalty declared dead. France had become the *Tiers-Etat*, and governed herself accordingly.

The people so absolutely surrendered their individual rights to the successive governing bodies, and political liberty so absorbed personal freedom, it is not surprising that matters of private interest were for a time adjusted by might and chicanery. The early assemblies assumed all governmental functions, executive, administrative, legislative and judicial, and performed them by direct intervention without any regular or definite mode. The ineffective results early induced some spasmodic attempts to define and regulate the civil relations of citizens, but the collection as examined to-day presents such imperfections, contradictions and marks

of unjust subservience of individual affairs to political exigencies that we doubt their seriousness and marvel at the men who made them into laws.

A glance at those men but serves to increase our perplexity. Notwithstanding that two-thirds of the lowest order in the States-General, nearly one-half of the twelve hundred members of the Constituent Assembly, and a *majority* of the seven hundred and thirty members of the Legislative Assembly *were lawyers* of considerable renown, it is nevertheless true that the decree of the Constituent Assembly suppressing the bar of France was adopted almost unanimously while Thouret, a celebrated *avocat* of Rouen, occupied the chair, and that other radical measures destructive of judicial safeguards were passed almost without a dissenting voice. It is likewise true that well-known nobles and churchmen advocated abolishing the privileges of the nobility and clergy during those same deliberations, in which the avowed aim was to create in France "one law, one family, one title—that of French citizen."

It is not less surprising that while the National Convention among its seven hundred and forty-nine members had *very few lawyers*, that body gave the first impetus to the civil code.

The multiplicity and character of the laws that were enacted from 1789 to 1793, representing, as they did, every branch of governmental functions, together with ancient laws and customs decreed to be still in force, gave rise to such confusion that a committee composed of *Cambacérès*, *Treilhard*, *Berlier*, *Merlin de Douai* and *Thibaudeau* was appointed in July, 1793, to draft a civil code which should be "clear and simple, and replace the chaos of the old laws and customs." The draft, really the work of *Cambacérès*, was presented to the Convention on August 9, 1793. It was never adopted as a whole, but the approval of most of its principles in divers forms from time to time covering many months presents one of the paradoxes of the Revolution. Sixty entire sessions of the body at large were devoted to a consideration of this work during a time when the partisans of the Convention were in vital conflict for domination, courts of justice mockeries, public order a fiction, rights of

property mere theory, individual liberty and life conjectural from hour to hour, and victims by the score passing to the guillotine every day. It was truly as Madame de Staël said in her *Considerations sur la Révolution Française*, speaking of this period: "Les faits se confondent à cette époque, et l'on craint de ne pouvoir entrer dans une telle histoire, sans que l'imagination en conserve d'ineffaçables traces de sang."

However in conflict otherwise, the Convention acted in absolute harmony upon this real forerunner and base of the *Code Napoléon*, prepared by men of the new era, but representing no mean development of intellect. They had inherited the fragmentary materials prepared by the Constituent Assembly whose older legal and clerical members had been schooled by the ancient juriconsults of France and thus contributed a copious knowledge of the Canon and of the Civil Law. The best had been preserved by the early assembly, but lacked the form of positive law, which Cambacérès and his colleagues endeavored to impress upon their work. Then, too, the Convention had other men whose legal attainments and philosophic learning were of great assistance. Although the bar of France had been swept away by the decree of 1790, a mass of men had under a general law assumed the title of *homme de loi* or *officious defender*, who, though lacking in legal training, attained considerable legal aptitude, and in addition there was also an esteemed remnant of the old bar who, like the Roman jurists, pursued their studies in retirement and advised when consulted. Both these classes were represented in the Convention and participated in the discussions.

The scope of this codification was perhaps in some particulars beyond existing conditions, but the rights of property, the status of individuals, the domestic relations and the contractual relations generally were set forth in accordance with modern ideas, except as to public duty and the rights of women, which were quite revolutionary. The ensemble, however, embraced a set of positive laws well suited to the whole of France.

While the debates were in progress a decree was adopted (December 4, 1793), providing for the collection of all "laws concerning the public interests and of general applica-

tion" under the title of *Bulletin des lois de la République française*. Into this collection were gathered and published, with other legislation, the various civil laws selected from the report of the committee for enactment.

These steps toward defining the civil relations remained undisturbed by any subsequent political changes, and were practically the only lasting good accomplished by that body of men whose deeds of violence ended with the promulgation of the Constitution of 1795, having existed upwards of three years, and issued eleven thousand decrees.

It is worthy of remark as a striking incongruity that notwithstanding the declaration of principles of the National Assembly in 1789, the reiteration of them by the adoption of the Constitutions of 1791, 1793, 1795 and 1799, the only substantial efforts to adequately settle the civil conditions were made by the Convention which defied all law, and by Bonaparte, who declared he was the source of every law.

Excepting the futile attempt of Cambacérès, while he was a member of the Council of Five Hundred, under the Directory, to secure attention for the civil code which after the Convention he had sought to perfect, nothing was done upon the subject until the general revival of ancient institutions began under the First Consul. It is true that the general school system had been created in 1795, but that was purely elementary. After the Constitution of 1799 was promulgated there was a definite movement toward placing the new France upon an enlightened and firm foundation. Action upon the civil code, the law schools and the bar went hand in hand, although created or re-established at different dates. The ancient and honorable attributes of the bar, however, were at last restored with modifications made necessary by the new conditions and the personality of the new master. The schools of law, although inaugurated after the civil code, were created with a particularity which shows that the Roman Law in France had become so imbedded as to resist even the extraordinary shock of the Revolution and removes any surprise at finding the new code founded upon it. The curriculum is interesting: "The French Civil Law in the order established by the civil code; the elements of natural law and the law of nations (*jus*

*gentium*); the Roman Law in its affinity with the French Law; the Public Laws; the French Civil Law in its relation to the public administration, and lastly, criminal legislation and civil and criminal procedure."

The initial move toward the *Code Napoléon* was taken in July, 1800, when the First Consul appointed a commission composed of *Portalis*, *Tronchet*, *Bigot de Préameneu* and *Malleville* to draft a project. In four months the report was submitted, and after being circulated among the various tribunals for suggestions and criticism, was presented to the Council of State, presided over by Bonaparte himself, for consideration before being sent to the Legislative Corps for final adoption. The commissioners had the advantage of being representative lawyers and statesmen who combined a knowledge of the law as it existed and had been taught under the ancient *régime* with a lively recollection of the changes wrought during the Revolution and the pressing needs arising therefrom. Tronchet had indeed vainly urged the Constituent Assembly to put order into the civil laws, and Cambacérès had devoted many years to the subject. The others were also men of parts who appreciated the needs of the hour.

After months of discussion before the Legislative Corps, during which arguments were made evincing the profoundest thought based upon wide research and citation of authorities, including the *Roman Law*, *Montesquieu*, *Blackstone*, *Vattel*, *Ricard*, *Savary*, *Grotius*, *Puffendorf* and *Pothier*, the thirty-six laws, consisting of 2,281 articles, which had been decreed from time to time, beginning March 5, 1803, were united and adopted on March 21, 1804, under the title *Le Code civil des Français*, changed by the law of September 3, 1807, to *Code Napoléon*.

While the numbering of the articles is carried through without regard to other designations, there are the following principal divisions:

*Titre Préliminaire*: "De la publication, des effets et de l'application des lois en général."

*Livre Premier*: "Des personnes."

*Livre Deuxième*: "Des biens, et des différentes modifications de la propriété."

*Livre Troisième*: "Des différentes manières dont on acquiert la propriété."



As to form one cannot overlook the similarity to the Justinian Code in the general design, the arrangement of subjects, and particularly in the conciseness and details of application set forth under some of the heads. There is also much resemblance to portions of the ancient Burgundian Code, the Code of the Visigoths, and parts third, fifth and sixth of the Spanish Code called *Las Siete Partidas*, promulgated in 1505.

The substantial elements are drawn from the Civil Law, Feudal Customs, Canon Law, Royal Ordinances, and Laws of the Revolutionary Assemblies, which predominate in the order named, showing how firmly tradition held the French people despite the annihilating processes of the Revolution.

While a great many commentators have arisen, notably Duranton, Troplong, Demolombe, Acollas and Mourlon, who have presented the code in its true light, others, as Austin and Savigny, have been severe upon what they term the haste of its compilation. These latter two writers seem to forget the three years it was subjected to the scrutiny and consideration of the various tribunals and legislators. They reveal their respective English and German birth and consequent leaning toward the feudal laws.

To properly present the interesting comparisons with the Common Law and its American modifications would require too much space and perhaps be wearisome from detail to all but those having a special interest. A brief summary, however, may be presented of some of the leading features.

In the preliminary title where we look for maxims and fundamental enunciations we are amused to find declared that "The laws of *police et de sureté* are obligatory on all the inhabitants," but our more serious attention is arrested by "The law provides only for the future: it has no retroactive effect;" "The judge who refuses to act under the pretext of silence, obscurity or insufficiency of the law may be prosecuted for denial of justice," and "No person can by agreement avoid the laws concerning public order and good morals."

Under the title of the First Book—"Of Persons"—we are not surprised to see the Civil Law appear in the ascertainment and regulation of the "civil state" of French citizens.

Seven of the eleven titles of this book are devoted to marriage, divorce, parent and child, adoption, parental powers, guardianship and the family council, that legal entity so perplexing to the uninitiated of foreign birth.

It was upon this book that the First Consul left the impress of his personality. He had views upon the domestic relations not then avowed, but manifested later, which he desired to make effective as laws. He attended many meetings of the Council of State, and in taking part in the discussions, according to the kind chroniclers of the times, exhibited extraordinary mental capacity and wisdom.

The provisions concerning parent and child, such as the severe filial allegiance and submission, recognition of natural children, the act of marriage and the parental disability to disinherit offspring, while in base following largely the Roman Law, are markedly the product of the Revolution. Natural law and "reasons of state" alone dictated these articles. The Christian religion was still so dominated by the cult of Reason that this portion of the work proclaimed a Godless people.

The causes for divorce reflect clearly the social conditions of the day. The husband is permitted to demand a divorce for adultery of the wife (Art. 229), but she can do likewise for the adultery of the husband only "lorsqu'il aura tenu sa concubine dans la maison commune" (Art. 230). Cruel treatment on the part of either (Art. 231) and condemnation for an infamous crime (Art. 232) are also grounds. The final cause, however, is worthy of particular attention as being the direct work of Bonaparte: Incompatibility manifested by mutual and persistent agreement that a common life is insupportable (Art. 233). Associated with that article is the recollection of many bitter domestic conflicts after the return from Egypt.

The Second Book—"Of Property and the Modifications of Proprietorship"—is the shortest, containing but four titles. After the definitions in the short first and second titles, the other two are devoted to the principles of *usufruct* and *servitudes*, in which there is a strange mixture of Roman Law, feudal customs and revolutionary utilitarian measures. The refinement of detail is illustrated by the

following: "If the usufruct is established of an animal that perishes without the fault of the beneficiary he is not required to replace it nor to pay its value" (Art. 615).

The servitudes are defined with like particularity. Rights of way, drip and rain, light and air and party walls are dealt with in terms so familiar to the reader of the Common Law that the feudal system is quickly recognized as the far-away common source.

The Third Book—"Of the Different Methods of Acquiring Property"—deserves more careful consideration than can be here given to it. Of the twenty titles the most important are: (1) Succession, (2) Testaments, (3) Contracts in General, (5) Contracts of Marriage and Property Rights of Husband and Wife, (6) Sales, (9) Partnership, (11) Bailments, (18) Liens and Pledges, and (20) Limitations. A preliminary title declares certain relevant principles touching proprietorship, such as "Property without a master belongs to the State," "Treasure found on the land of another belongs half to the finder and half to the owner of the land."

The care taken to make clear all questions of inheritance is worthy of being shown by a few selections: In case of doubt as to which of two possible heirs perished first in a catastrophe it is determined by Articles 720, 721 and 722, based upon natural presumptions of survivorship according to age and sex. Other illustrations are: "A foreigner cannot inherit the French property of a relative, whether foreign or native, except in the way a Frenchman could inherit in the country of the heir-claimant" (Art. 726); "They are unable to inherit, (1) who have been condemned for killing or attempting to kill the deceased, (2) who have accused the deceased of a capital crime adjudged infamous, or (3) who knowing of the murder of the deceased have not made it known to the authorities" (Art. 727); "Representation takes place without limit in the direct line of descendants" (Art. 740). The preference given to parents over the surviving husband or wife even when no children, legitimate or natural, survive (Art. 767), arrests the attention, but is quite consistent with the theories of marriage and intestacy borrowed from the Roman Law.

As to *testaments*, the most striking provisions are those prohibiting bequests to guardians who have not accounted, physicians, religious ministers and charities (without permission of the government), and concerning legacies and devises marked by a degree of scope and certainty never dreamed of by the Romans. Sections 1 and 2 of Chapter V, beginning with Article 967, is devoted to the form and the manner of making of wills. The *olographic* will must be written, dated and signed entirely by the hand of the testator, but is not subject to any other conditions. The *public* will must be dictated to a notary by the testator, to whom the notary must read it in the presence of the witnesses: this will requires subscribing witnesses and the signature of the maker, except when prevented by inability expressly recognized by the notary. A commendatory safeguard is thrown about the public will by Article 975: Legatees, relatives by blood or marriage as far as the fourth degree, and clerks of the notary receiving the will will not be permitted to act as witnesses of the *testament par acte public*.

The *mystique* or secret will, which the testator, having prepared it by his own or another's hand, seals and deposits with a notary in the presence of six witnesses, likewise is encompassed by every safeguard against fraud. The details solve in advance even problems arising from the testator's physical infirmities such as dumbness, blindness and inability to read or write.

Twenty-one articles (981-1001) are devoted to nuncupative wills of soldiers and marines with a thoroughness quite consistent with the coterminous men and times.

The third title, beginning with Article 1101 and ending with Article 1369, is entirely upon the subject of "Contracts in General." In both base and structure the Roman Law predominates, but there are reflections of ancient French commercial customs and the distrustful business traits which arose during the Revolution. The science and brilliancy of the code-makers are markedly evident here, and undoubtedly to this portion the work owes its perpetuation and the admiration of other nations. No comment upon this section could be just or adequate in a paper of this character.

The article on "Contracts of Marriage," while interesting

in a comparative aspect, does not appeal to Americans. The element of matrimonial bargain and sale well became the French people of 1800. An absolute certainty of the conditions upon which two mature beings agreed to cohabit and propagate their species, as the purpose of marriage was then viewed, was quite essential for the welfare of the spouses and the issue. Nor could any possible situation be left to chance in view of the laws adopted under the heads of forms of marriage, domestic relations, guardianship and inheritance. Consequently while permitting ante-nuptial agreements not contrary to good morals, nor in conflict with positive laws, general regulations are established for the two kinds of marriage contracts known as "le régime de la communauté," where all the property at the time of and during marriage becomes one unit in which both parties have equal shares, and "le régime dotal," where the property brought to the couverture by the wife remains intact for herself and the issue, although administered by the husband, subject to divers ante-nuptial stipulations. That the codifiers were acting for a united France is shown by the terms of Article 1390: "The spouses will no more be permitted to stipulate that their association will be regulated by one of the local customs, laws or statutes which heretofore had force in divers parts of French territory, which are abrogated by the present Code."

The subjects of *Sales* and *Bailments* are treated largely along the lines of the Justinian Code, and serve to strengthen the regulations concerning contracts in general.

Under *Partnership* the principles of early jurisprudence and the later Law Merchant are revealed, and many terms concerning the character of the association, the liability of the partners and the rights of creditors are highly commendable, and could be adopted advantageously by many states in this country.

*Hypothecation*, covering eighty-nine articles, beginning with 2114, presents features peculiar to French social conditions and civil institutions. There is a strangeness in the very division of the subject made in Article 2116: "It is legal, judicial or by agreement." The term *lien* almost expresses the "hypothèque légale" and "judiciare," which

include (Art. 2121) the rights of a wife in the property of her husband, of minors or municipal bodies to an accounting out of the property of the guardian or public official, and also the binding force of judgments or other evidences of obligation made valuable by judicial act. Then there is the pledge by agreement resembling in principle the ordinary mortgage of this country regulated, however, by a vast number of details totally unknown to our laws.

The twentieth title, *Prescription*, attracts attention by declaring that "The State, public institutions and communes are subject to the same prescriptions as individuals, and may oppose them in like manner."

Then follow many articles concerning limitations under varied general and exceptional conditions, quite arbitrary and related to no especial school of law.

One cannot doubt, in giving a general glance at the whole of this Code, that it is not only interesting from the standpoint of historical or comparative jurisprudence, but that a knowledge of its articles upon Contracts, Partnerships, Sales and Bailments is daily growing more important to the people of this country as our commercial interests become more international in character.

It is necessary, in conclusion, to remind the reader that the quotations made use of in considering the terms of the Code are in many instances not the law of France to-day, having been superseded or amended by subsequent legislation. As the most notable may be mentioned those under the title of Divorce. In 1816 France abolished divorce, and did not re-establish it until 1884, but even then did not revive the famous ground of "incompatibility by mutual consent," so important to Bonaparte in 1800. Wills and domestic relations have also been greatly modified.

Finally it may be said, in the words of Martin: "In spite of its faults and its insufficiencies, the French civil code is nevertheless, as a whole, the realization of the views of the eighteenth century and the principles of 1789. New France may revise or correct, but cannot replace it. The common work of 1791, 1793 and 1794, it is a monument of the French Revolution which the 1800 reaction was forced to complete and consecrate."

*William W. Smithers.*